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U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
DEPUTY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY McGINNIS,  
CDCR # P-19835,

Plaintiff,

vs.

DANIEL PARAMO, et al.,

Defendants.

Civil No. 14cv1481 WQH (MDD)

**ORDER:**

**(1) GRANTING MOTION TO  
PROCEED *IN FORMA PAUPERIS*  
[ECF Doc. No. 2]**

**AND**

**(2) SUA SPONTE DISMISSING  
COMPLAINT FOR FAILING TO  
STATE A CLAIM PURSUANT  
TO 28 U.S.C. § 1915(e)(2)(B)(ii)  
AND 28 U.S.C. § 1915A(b)(1)**

Anthony McGinnis (“Plaintiff”), a state prisoner currently incarcerated at Richard J. Donovan Correctional Facility (“RJD”) in San Diego, and proceeding pro se, has filed a civil rights complaint (“Compl.”) pursuant to 42 U.S.C. § 1983.

Plaintiff claims the Warden at RJD, correctional officials at Calipatria State Prison (“CAL”), and the Chief Inmate Appeals Officer for the California Department of Corrections and Rehabilitation (“CDCR”) violated his right to access to the courts by confiscating and later destroying his personal property, including several cassette tapes Plaintiff alleges contained “official trial transcripts,” and denying his inmate grievance

1 regarding the incident. *See* Compl. at 2-3. Plaintiff alleges his property was confiscated  
 2 on July 7, 2009, after he was transferred from California State Prison's Substance Abuse  
 3 Treatment Facility ("SATF") to CAL, *id.* at 3, and has attached copies of his CDC 602  
 4 inmate appeal (Log No. CAL-09-01367), through which he alleges to have exhausted his  
 5 administrative remedies related to the lost property. *Id.* at 4-9, 11, 14-19. Plaintiff seeks  
 6 \$150 million in general and punitive damages. *Id.* at 12.

7 Plaintiff has not prepaid the \$400 filing fee mandated by 28 U.S.C. § 1914(a);  
 8 instead, he has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28  
 9 U.S.C. § 1915(a) (ECF Doc. No. 2).

# **I.**

## **MOTION TO PROCEED IFP**

12 All parties instituting any civil action, suit or proceeding in a district court of the  
 13 United States, except an application for writ of habeas corpus, must pay a filing fee. *See*  
 14 28 U.S.C. § 1914(a).<sup>1</sup> An action may proceed despite the plaintiff's failure to prepay the  
 15 entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*  
 16 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, if the plaintiff is a  
 17 prisoner and he is granted leave to proceed IFP, he nevertheless remains obligated to pay  
 18 the entire fee in installments, regardless of whether his action is ultimately dismissed.  
 19 *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir.  
 20 2002).

21 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act  
 22 ("PLRA"), a prisoner seeking leave to proceed IFP must also submit a "certified copy  
 23 of the trust fund account statement (or institutional equivalent) for . . . the six-month  
 24 period immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2);  
 25 *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account

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26  
 27 <sup>1</sup> In addition to the \$350 statutory fee, all parties filing civil actions on or after  
 28 May 1, 2013, must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a),  
 (b); Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule (eff. May  
 1, 2013). However, the additional \$50 administrative fee is waived if the plaintiff is  
 granted leave to proceed IFP. *Id.*

1 statement, the Court assesses an initial payment of 20% of (a) the average monthly  
2 deposits in the account for the past six months, or (b) the average monthly balance in the  
3 account for the past six months, whichever is greater, unless the prisoner has no assets.  
4 *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of  
5 the prisoner then collects subsequent payments, assessed at 20% of the preceding  
6 month's income, in any month in which the prisoner's account exceeds \$10, and  
7 forwards them to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

8 In support of his IFP application, Plaintiff has submitted the certified copies of his  
9 trust account statements required by 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2.  
10 *Andrews*, 398 F.3d at 1119. The Court has reviewed Plaintiff's trust account statements,  
11 as well as the attached prison certificate issued by a senior accounting officer at RJD,  
12 where he is currently incarcerated, verifying his account history and available balances.  
13 Plaintiff's statements show an average monthly balance of \$3.18, average monthly  
14 deposits of \$15.94, and an available balance of \$9.00 in his account at the time of filing.  
15 Based on this financial information, the Court GRANTS Plaintiff's Motion to Proceed  
16 IFP (ECF Doc. No. 2) and assesses an initial partial filing fee of \$3.18 pursuant to 28  
17 U.S.C. § 1915(b)(1).

18 However, the Secretary of the CDCR, or his designee, shall collect this initial fee  
19 only if sufficient funds in Plaintiff's account are available at the time this Order is  
20 executed pursuant to the directions set forth below. *See* 28 U.S.C. § 1915(b)(4)  
21 (providing that "[i]n no event shall a prisoner be prohibited from bringing a civil action  
22 or appealing a civil action or criminal judgment for the reason that the prisoner has no  
23 assets and no means by which to pay the initial partial filing fee."); *Taylor*, 281 F.3d at  
24 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal  
25 of a prisoner's IFP case based solely on a "failure to pay . . . due to the lack of funds  
26 available to him when payment is ordered."). The remaining balance of the \$350 total  
27 fee owed in this case shall be collected and forwarded to the Clerk of the Court pursuant  
28 to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

1 II.

2 INITIAL SCREENING PER 28 U.S.C. §§ 1915(e)(2)(B) AND 1915A(b)

3 A. Standard of Review

4 Notwithstanding Plaintiff's IFP status or the payment of any partial filing fees, the  
 5 PLRA also obligates the Court to review complaints filed by all persons proceeding IFP  
 6 and by those, like Plaintiff, who are "incarcerated or detained in any facility [and]  
 7 accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the  
 8 terms or conditions of parole, probation, pretrial release, or diversionary program," "as  
 9 soon as practicable after docketing." See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under  
 10 these statutes, the Court must sua sponte dismiss complaints, or any portions thereof,  
 11 which are frivolous, malicious, fail to state a claim, or which seek damages from  
 12 defendants who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b); *Lopez v.*  
 13 *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v.*  
 14 *Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

15 All complaints must contain "a short and plain statement of the claim showing that  
 16 the pleader is entitled to relief." FED.R.CIV.P. 8(a)(2). Detailed factual allegations are  
 17 not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by  
 18 mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)  
 19 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Determining  
 20 whether a complaint states a plausible claim for relief [is] . . . a context-specific task that  
 21 requires the reviewing court to draw on its judicial experience and common sense." *Id.*  
 22 The "mere possibility of misconduct" falls short of meeting this plausibility standard.  
 23 *Id.*; see also *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

24 "When there are well-pleaded factual allegations, a court should assume their  
 25 veracity, and then determine whether they plausibly give rise to an entitlement to relief."  
 26 *Iqbal*, 556 U.S. at 679; see also *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)  
 27 ("[W]hen determining whether a complaint states a claim, a court must accept as true all  
 28 allegations of material fact and must construe those facts in the light most favorable to



the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

However, while the court “ha[s] an obligation where the petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not “supply essential elements of claims that were not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

### **B. Deprivation of Property Claims**

First, to the extent Plaintiff claims his personal property was destroyed “in violation of the rules of the CDCR,” his Complaint fails to state a claim upon which § 1983 relief can be granted. *See* 28 U.S.C. §§ 1915(e)(2)(B)(ii); 1915A(b)(1).

Where a plaintiff alleges to have been deprived of a of property interest caused by the unauthorized negligent or intentional acts of state officials, he cannot state a constitutional claim where the state provides an adequate post-deprivation remedy. *See Zinerman v. Burch*, 494 U.S. 113, 129-32 (1990); *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). The California Tort Claims Act (“CTCA”) provides an adequate post-deprivation state remedy for the random and unauthorized taking of property. *Barnett v. Centoni*, 31 F.3d 813, 816-17 (9th Cir. 1994). Thus, because Plaintiff appears to challenge the negligent or intentional destruction of his property, the CTCA provides Plaintiff with an adequate state post-deprivation remedy, and these claims are not cognizable in a § 1983 action. *Id.*

### **C. Access to Courts Claims**

Second, Plaintiff argues that the destruction of his property, which included cassettes containing “official trial transcripts,” denied his access to the courts. *See* Compl. at 3.

Prisoners have a constitutional right to access to the courts. *Lewis v. Casey*, 518 U.S. 343, 346 (1996). The right is limited to the filing of direct criminal appeals, habeas

1 petitions, and civil rights actions. *Id.* at 354. Claims for denial of access to the courts  
2 may arise from the frustration or hindrance of “a litigating opportunity yet to be gained”  
3 (forward-looking access claim) or from the loss of a suit that cannot now be tried  
4 (backward-looking claim). *Christopher v. Harbury*, 536 U.S. 403, 412-15 (2002); *see*  
5 *also Silva v. Di Vittorio*, 658 F.3d 1090, 1102 (9th Cir. 2011) (differentiating “between  
6 two types of access to court claims: those involving prisoners’ right to affirmative  
7 assistance and those involving prisoners’ rights to litigate without active interference.”).

8       However, the plaintiff must allege “actual injury” as the threshold requirement to  
9 any access to courts claim. *See Lewis*, 518 U.S. at 351-53; *Silva*, 658 F.3d at 1104. An  
10 “actual injury” is “actual prejudice with respect to contemplated or existing litigation,  
11 such as the inability to meet a filing deadline or to present a claim.” *Lewis*, 518 U.S. at  
12 348; *see also Jones v. Blanas*, 393 F.3d 918, 936 (9th Cir. 2004) (defining actual injury  
13 as the “inability to file a complaint or defend against a charge”). The failure to allege an  
14 actual injury is “fatal.” *Alvarez v. Hill*, 518 F.3d 1152, 1155 n.1 (9th Cir. 2008) (“Failure  
15 to show that a ‘non-frivolous legal claim had been frustrated’ is fatal.”) (quoting *Lewis*,  
16 518 U.S. at 353 & n.4).

17       In addition, the prisoner must allege the loss of a “non-frivolous” or “arguable”  
18 underlying claim. *See Harbury*, 536 U.S. at 413-14. The nature and description of the  
19 underlying claim must be set forth in the pleading “as if it were being independently  
20 pursued.” *Id.* at 417. Finally, the plaintiff must specifically allege the “remedy that may  
21 be awarded as recompense but not otherwise available in some suit that may yet be  
22 brought.” *Id.* at 415.

23       Plaintiff’s Complaint fails to allege the actual injury required to state an access to  
24 courts claim. *See Lewis*, 518 U.S. at 351-53; *Silva*, 658 F.3d at 1104. Specifically, while  
25 he claims the cassettes destroyed by Defendants included copies of his trial transcripts,  
26 *see Compl.* at 3, he has failed to include any further “factual matter” to show how or why  
27 the loss of this property resulted in any “actual prejudice with respect to contemplated  
28

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1 or existing litigation, such as the inability to meet a filing deadline or to present a claim.”  
 2 *Lewis*, 518 U.S. at 348; *Jones*, 393 F.3d at 936; *Iqbal*, 556 U.S. at 678.

3 Moreover, Plaintiff’s Complaint also fails to identify or even nominally describe  
 4 the non-frivolous or arguable nature of the underlying cause of action he either  
 5 anticipated or lost as a result of Defendants’ actions. *Harbury*, 536 U.S. at 416 (“[L]ike  
 6 any other element of an access claim[,] . . . the predicate claim [must] be described well  
 7 enough to apply the ‘nonfrivolous’ test and to show that the ‘arguable’ nature of the  
 8 underlying claim is more than hope.”).

9 For these reasons, the Court finds Plaintiff’s access to courts claims must also be  
 10 dismissed for failing to state a plausible claim upon which § 1983 relief can be granted.  
 11 See 28 U.S.C. §§ 1915(e)(2)(B)(ii), 1915A(b)(1); *Iqbal*, 556 U.S. at 678.

#### 12 **D. Leave to Amend**

13 Because Plaintiff is proceeding without counsel, and it is not “absolutely clear that  
 14 no amendment can cure” the defects of pleading set forth above, the Court will grant him  
 15 an opportunity to amend. See *Lucas v. Dept. of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995);  
 16 *Lopez*, 203 F.3d at 1131; *Cervantes*, 5 F.3d at 1276-77.

### 17 **III.**

#### 18 **CONCLUSION AND ORDER**

19 Based on the foregoing, **IT IS HEREBY ORDERED** that:

20 1. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF  
 21 Doc. No. 2) is **GRANTED**.

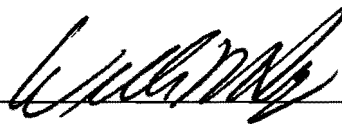
22 2. The Secretary of the CDCR, or his designee, shall collect the \$3.18 initial  
 23 filing fee assessed by this Order from Plaintiff’s prison trust account, and forward the  
 24 remaining \$346.82 balance of the full fee owed by collecting monthly payments from  
 25 Plaintiff’s account in an amount equal to twenty percent (20%) of the preceding month’s  
 26 income to the Clerk of the Court each time the amount in Plaintiff’s account exceeds \$10  
 27 pursuant to 28 U.S.C. § 1915(b)(2). **ALL PAYMENTS SHALL BE CLEARLY**  
 28 **IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.**

1           3.     The Clerk of the Court is directed to serve a copy of this Order on Jeffrey  
2 A. Beard, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001.

3           **IT IS FURTHER ORDERED** that:

4           4.     Plaintiff's Complaint is **DISMISSED** for failing to state a claim upon which  
5 relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1).  
6 However, Plaintiff is **GRANTED** forty-five (45) days leave from the date of this Order  
7 in which to file an Amended Complaint which cures all the deficiencies of pleading  
8 noted above. Plaintiff's Amended Complaint must be complete in itself without  
9 reference to his original pleading. *See* S.D. CAL. CIVLR. 15.1. Defendants not named  
10 and all claims not re-alleged in the Amended Complaint will be considered waived. *See*  
11 *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

12  
13  
14 DATED: 9/18/14



HON. WILLIAM Q. HAYES  
United States District Judge